LETTERS

UPON THE INTERPRETATION OF THE

FEDERAL CONSTITUTION

KNOWN AS

THE BRITISH NORTH AMERICA ACT,

(1867,)

BY

The Honorable Mr. Justice T. J. J. LORANGER.

FIRST LETTER.

TRANSLATION.

QUEBEC:

PRINTED AT THE "MORNING CHRONICLE" OFFICE.

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PREFACE.

During the past century of British rule, the French race in Canada has been through many political crises and has fought many constitutional battles. It has, however, come out triumphant, and averted the dangers which threatened it.

The antagonism resulting from different institutions, traditions, languages and religious beliefs—irresistible, when people of various origins dwell in the same territory—which influences them sometimes without their knowledge, and often against their will, has made the position of this race an exceptional one in the midst of the Anglo-Saxon population of the Confederation.

The rivalry of races is the same as that which existed under former régimes, but is on a larger scale. Though tempered by the good feeling existing between the provinces and disguised by the apparent cordiality of their relations, it none the less exists, and, whenever special circumstances give rise to a conflict between interest and friendly feeling, will certainly break out. That which occurred in the past may recur in the future. The multiplicity of political incidents and the complication of interests thereby occasioned, render it morally certain.

French-Canadians should, under the new régime as they did under the old, see with jealous care to the maintenance

of their national rights, the preservation of their political autonomy, combat and prevent any aggression that may disturb these guarantees.

The anomaly of our situation has, with respect to us, even changed the signification of the terms of public law. Political Union, which, for other nations means increased force, natural development and concentration of authority, means, for us, feebleness, isolation and menace, and Legislative Union, political absorption!

Before Confederation it was the absorption of the Latin element by the Anglo-Saxon element of two provinces, now it is by that of five.

This union of the two provinces, which, in 1791, was already dreamed of, and which was proposed in 1822, was obtained in 1840, but, fortunately, subsequent events disappointed the sinister anticipations.

The Unionists of 1822, with Chief Justice Sewell at their head, did not however look upon legislative union as the sole means of our destruction. Having failed in their efforts to obtain the measure, they were content to demand the confederation of all the English provinces, with one central government and provincial governments, whose powers would be reduced to those of mere muncipalities. The desired result would be the same. In concentrating all or nearly all power in the central government, the influence of the French race—the majority in the Province of Quebec—would be swamped, and by reducing to insignificance the provincial legislatures, this system would finally come to be distasteful, and to it would succeed the Legislative Union of all the confederate provinces.

This is exactly what will happen to-day if the idea of centralization be successful.

The authors of the Confederation of 1867 ostensibly had other views. The resolutions of the Quebec conference were founded upon the principle of the strict equality of or equal authority between the Dominion and the provinces, without the subordination of the latter to the former, within the limits of their respective powers. In the sphere of their local powers the authority of the provinces was to remain absolute, as the federal power was to be within the limits of its general powers. It was on these conditions that the provinces, and especially the Province of Quebec, consented to enter the Federal Union.

This view of the federal compact arises, as well from the discussion of the measure in Parliament and in the press, as from the draft settled at the Conference; and, when examined in its judicial character, the Federal Constitution can admit of no other interpretation.

It is in this sense also that, with hardly an exception, the judges of the courts of first instance and of appeal in Quebec and Ontario have interpreted it; but the Supreme Court, by a series of judgments, reversed this jurisprudence and established the preeminence of parliament over the legislatures, and reduced the latter to the role counselled by Chief Justice Sewell and Lord Durham, that of mere municipal bodies

It is especially in the case of *Mercer, the Province of Ontario and the Government of Ottawa* in which the Government of Quebec intervened, that the centralizing and absorbing tendencies of the Supreme Court were disclosed. Its judgment was, however, taken in appeal to the Privy Council, which, in the term of last July, unanimously reversed it.

At the time of the rendering of the judgment by the English Court, I published, in a series of articles inserted in the newspapers, an examination into the interpretation of

the federal compact, which, at the request of several persons, I now republish in the present letter, which will be followed by others.

Shall I add that the Supreme Court does not seem to be alone in viewing the federal compact in a manner unfavorable to the provinces, and that the federal parliament has, on several occasions, encroached upon the provincial legislatures and overstepped the sphere of its powers ? The license act of last session is, in my opinion, a striking example.

It was the extraordinary character of this act that called public attention to the danger of these encroachments, revealed their tendency to Legislative Union, and awakened public opinion in the Province of Quebec, until then unaroused—notwithstanding the lively interest which it should excite—upon this as upon several other questions.

May I hope that the importance of the subject will communicate a share of its interest to these pages in which it is endeavored to combat the theory of the Supreme Court and to defend provincial autonomy.

The benefit of this autonomy does not alone concern a portion of the population of the Province of Quebec, in which the conflict of race has now ceased. All Lower-Canadians, as well as all the inhabitants of the other confederate provinces, have a common interest in opposing the excessive centralization of federal power, the lowering of their legislatures, and the gradual disappearance of their constitutions.

It is, in truth, the cause of the provinces that I have undertaken to defend against an enemy which as yet appears only as a spot upon the horizon, but this spot may increase in size, may become a cloud, and the cloud may bring forth a tempest ! From out of this tempest may we never see arise.....Legislative Union !

When I utter these words optimists—I should call them *quietists*—may tax me with giving rise to vain apprehensions and creating imaginary alarm.

All the better if I give a false alarm. The disappointment of passing for a false alarmist will, by no means, exceed my delight in finding myself mistaken !

But if the danger I fear really menaces us, I wish to be the sentinel on the alert, whose challenge resounds throughout the national camp and warns the combatants to see to their arms. *Si vis pacem, para bellum !*

Quebec, 27th December, 1883.

T. J. J. LORANGER.

LETTERS

UPON THE INTERPRETATION OF THE

FEDERAL CONSTITUTION.

FIRST LETTER.

SUMMARY.—I. The Mercer case. II. Examination of the question respecting the conflict of powers raised between the Federal and Provincial Governments. III. Did the old provinces preserve their corporate identity under Confederation? IV. Did they retain their former constitution? V. Nature of the functions of Lieutenant Governors. VI. Privileges, powers and rights of the Legislatures. VII. Interpretation of sections 91 and 92 of the Confederation Act. VIII. Summary of the propositions set forth in this letter.

I.

THE MERCER CASE.

The French press of the Province, without enlarging upon the questions raised in the suit of Mercer and the Province of Ontario, decided in the Privy Council, confined itself simply to noticing their importance from the stand point of provincial autonomy. Owing to special circumstances I have become particularly cognizant of these questions and think that I should supply this omission.

The facts, as respects the chief question, are exceedingly simple. Andrew Mercer, a wealthy land owner of Toronto,

died intestate in 1871, without leaving heirs, Andrew F. Mercer, a son of the deceased, being unable to establish his legitimacy. The Province of Ontario then took possession of the estate as having lawfully escheated to it. Afterwards being disturbed in its possession by the claimant, Andrew F. Mercer, it, in 1878, caused to be lodged in the Court of Chancery an information against the latter. To this information the defendant, supported by the Federal Government, which intervened to contest the claim of the Province of Ontario, filed an answer technically called a demurrer, on the ground that escheats did not, by the British North America Act, devolve upon the provinces, but had been transferred to the Federal Government.

This answer, having been overruled by Vice-Chancellor Proudfoot, an appeal was taken by both Mercer and the Federal Government to the Court of Appeals for Ontario, which, by the unanimous decision of four judges, confirmed the vice-chancellor's decision.

Against this latter judgment an appeal was taken to the Supreme Court, four judges out of six viz: Justices Henry, Fournier, Taschereau and Gwynne against Chief Justice Ritchie and Justice Strong reversed the second decision. Thence an appeal was taken to Her Majesty's Privy Council which decided in favor of the Province of Ontario; four Lords of the Council, the Lord Chancellor, Sir Barnes Peacock, Sir Montague Smith, Sir Robert Collier and Sir Arthur Hobhouse, unanimously reversing the decision of the Supreme Court.

A similar question raised before the Superior Court of Quebec, and afterwards carried into appeal, in the matter of the escheated succession of Edward Fraser, and decided in the first instance by the same Justice Taschereau in favor of the Dominion, was afterwards decided in favor of the provinces in accordance with the judgment of Vice-Chancellor Proudfoot, the Ontario Court of Appeals and the Privy

Council, by the Court of Appeals of Quebec, composed of five judges.

Thus, out of twenty judges who decided the question, four pronounced themselves in favor of the Federal Government and sixteen against it, forming a majority of twelve in favor of the provinces. If, to this number, we add the superior authority of the Privy Council, it is difficult to suppose that a jurisprudence so sustained by the almost unanimous decision of the courts can ever be shaken. It may, on the contrary, be considered that this question is finally settled and safe from all judicial variation and the judgment, in my opinion, sets aside the jurisprudence of the Supreme Court, hitherto so unfavorable to the provinces.

If the pretension raised by the Federal Government before the courts, to the effect that the British North America Act had transferred property in escheats to the Federal Government, to the exclusion of the provinces, had remained the sole question, the litigation would have been only of local interest; but to this main question were added certain incidental ones whose discussion gave to the case a constitutional importance and questioned the political autonomy of the provinces.

In support of its chief reason the Government of Canada contended that the Sovereign, whose sole representative in the Dominion is the Governor General, does not form part of the Executive Council, or of the Legislatures of the Provinces; that the latter had no legal power of acquiring the right in question, a right which had naturally fallen to the Federal power, and, whatever might be the terms of the British North America Act, it was impossible for the Imperial Parliament to have conferred successions in escheats upon the provinces, as these rights constituted Royal prerogative, *jura regalia*, inalienable by public law, and which the Sovereign or his representatives alone could enjoy.

Thus, upon the main question was grafted an incident closely connected with it, which from a constitutional point of view was of greater importance, and from a legal point identified itself with it. In fact, of what use would it be to allow the right of escheats to the provinces if they could not receive the fruits thereof ? For the provinces to recover in their suit, the courts should have decided the two following questions in their favor.

1st. By the federal compact, the royalty of escheats which they possessed before Confederation was confirmed to them and they have never since ceased to fully enjoy it, and

2ndly. The provincial executive, at whose head is the Lieutenant Governor, still represents the executive power of the mother country, as the lieutenant governors are, as were the governors under the old regime, the representatives of Her Majesty.

Thus, in deciding in favor of the provinces the question of escheats, the lords of the Privy Council also decided in their favor the question of the legal capacity of the lieutenant governors and acknowledged their quality of representatives of the Crown.

To properly appreciate the bearing of this latter decision, we must consider the nature of the reasons urged by the Federal Government against it, which would necessarily be approved as a corollary, if the decision had been unfavorable to the provinces.

These reasons, which are all based on the preconceived notion that the provinces are only larger municipalities, without any sovereign power, as the Queen does not form part of the provincial governments and the lieutenant governors are not her representatives, were formulated before the court in the following propositions:

1. The federal executive power is in the person of the Sovereign of England, represented by the Governor General, and Her Majesty is, as in England, the first branch of the legislative power. The Federal Parliament is composed of the Queen, the Senate and the Commons. It is not so with the provinces. The provincial executive power is not in the person of the Lieutenant Governor, as representing Her Majesty, who does not form part of the provincial legislatures of which she is not a branch.

2. These legislatures are not parliamentary bodies and exercise none of the prerogatives of the English Parliament. They are civil rather than political, municipal rather than legislative bodies, properly so called.

3. The Lieutenant Governor is only a subordinate officer, deriving his functions from the Governor General, who appoints and removes him. He does not hold his powers directly from the Queen, as he does not represent the Queen. He exercises no royal functions in virtue of his office and is only the chief executive officer of the province.

4. The legislative power of the provinces is only a delegated one, taken from the general powers of the Federal Parliament, and remains limited to the category of cases enumerated in section 92 of the Union Act.

5. From this restriction arises the inferiority of the provinces and their subordination to the Federal power, which, with respect to them, became a quasi sovereign power, and they have since been only secondary corporations, one of the counsel even called them *quasi corporations*, depending from the central power.

6. All the powers not exclusively and specially attributed to the provinces by section 92 of the Union Act, belong to the Federal Government, which is the source of the Provincial Governments.

I have just stated that, by admitting that the right of escheat, (which is a royal appanage, and forms part of the royal prerogative) belonged to the Ontario Government, the lords of the Privy Council, have, without its being necessary to specially mention it, by logical inference and of necessity rejected the first proposition of the Federal Government that Lieutenant Governors are not Her Majesty's representatives. I will fully demonstrate this.

To persons versed in the practice of the Courts and familiar with judicial logic, the value of inferential or inductive reasoning, which is called *a posteriori* argument, admits of no doubt. As circumstantial evidence is in many cases the most convincing, so reasoning by induction is as often the most conclusive. Thus A, son of B, deceased, in his quality of lawful heir sues C, to recover a debt due deceased, C pleads that the debt is not due to the estate, and adds that A is not heir to B. The judgment omits pronouncing upon the second defence, but decides against C the conclusions of the demand. Is it not evident that, in adjudging to him the debt, originally due to B, the judgment acknowledged A, as being in the rights of B, and considers him as his lawful heir.

To come to the present case and render the comparison more striking, let us suppose that the Court of Chancery, upon the conclusions of Andrew F. Mercer, as lawful heir of Andrew Mercer, had declared unfounded the petition in escheat of both governments, and had granted the estate to him, without actually deciding upon the question of status, is it not evident that it would have, inferentially, by its decision on the main question, decided his legitimacy.

Thus by adjudging the escheat, to the province of Ontario without pronouncing upon the reasons based upon its want of legal capacity, and its not representing the Crown, did not the Privy Council admit its legal quality ? These prin-

ciples are so familiar to legal minds, that I would think i puerile to notice them, if certain papers had not opposed their application, and, from the silence of the Court respecting the second question, endeavored to show that the judgment pronounced by the Council was favorable to the pretensions of the autonomists. This argument is incontestably without foundation and is insufficient to rebut the induction drawn from it by stating that the judgment pronounced as favorably upon the qualities of the provinces as if it had expressly so declared.

The representative character of the provinces being thus recognized, let us establish the consequences which as corollaries of this recognition are imposed upon the discussion of the other reasons of the Federal Government, not, however, without having first recalled the arguments raised by the Provinces of Ontario and Quebec, before the Supreme Court and respecting their method of interpreting the Union Act, a method which I will call the provincial theory.

This theory is the following :—

1. In constituting themselves into a confederation, the provinces did not intend to renounce, and in fact never did renounce their autonomy. This autonomy with their rights, powers and prerogatives they expressly preserved for all that concerns their internal government ; by forming themselves into a federal association, under political and legislative aspects, they formed a central government, only for interprovincial objects, and, far from having created the provincial powers, it is from these provincial powers that has arisen the federal government, to which the provinces have ceded a portion of their rights, property and revenues.

2. At the time of Confederation, all legislative and executive power, legal attributes, public property and revenues,

that are now the appanage of the central government and of the provinces, belonged to the latter. The federal compact did not create a single new power. The part now belonging to the federal government was taken from the jurisdiction of the provinces.

3. The powers, in particular, that are granted by section 91 to Parliament, formed part of the powers of the provinces, in common with those mentioned in section 92, which remained within the jurisdiction of the provinces. These powers have been divided. Those conferred upon the federal parliament were given to it, and those left to the provincial legislatures, they retained.

4. The same rule applies to the distribution of the property, all belonging to the provinces at the time of Confederation, and in which the federal government has no share, except what has been specially given to it.

5. The authority of the Lieutenant Governors, within the limits of their jurisdiction, is on an equality with the authority of the Governor General. Both are, within their respective spheres, representatives of the Queen, the former in the provincial, the latter in the federal sphere. It is true that the Lieutenant Governor is appointed by the Governor General, but it is in the name of the Queen and as her agent or representative that the latter so appoints him. It is the Queen whom they represent in their official duties, and in her name that they act.

6. The relations between the provinces and the Imperial Government remained, after the Union, what they were before. The Sovereign forms part of the legislature of each province, by the intermediary of the Lieutenant Governor. It is in the name of the Queen that the Houses are called and prorogued. The sole change, in this respect, consists in the disallowance and disapproval of provincial acts, which is

made by the Governor General, but also as representing Her Majesty.

7. The provincial executive government resides in the person of the Lieutenant Governor, as the representative of the Sovereign.

8. It is the same with the concession of the revenue to the federal government as with public property. The public treasury belonging to the provinces was divided to make a revenue for the federal government, the remainder was left with the provinces.

In a word, in the provincial theory, it is the idea of the equality of both governments which is dominant, whilst in the federal theory it is the subordination of the provincial to the federal element which prevails.

Taking as a basis of the argument, the principle that Lieutenant Governors are the representatives of the Sovereign for provincial purposes, we must now ascertain which of the two theories, that of the federal government or that of the provincial government is established by such recognition.

In what capacity do the Lieutenant Governors represent Her Majesty, if not in her quality of a constitutional Sovereign, in other words in the exercise of her royal prerogatives. The executive power in England is in the person of the Sovereign who is also the first branch of the Legislature. Royal prerogatives are therefore at once executive and legislative. Each of these powers is one and indivisible. It is the executive power in its entirety that is exercised by the English Sovereigns, as it is of the legislative power in its integrity that they form part. They perform all the acts of the executive power and give their concurrence to all those of the legislative power. Every executive act not

performed by them is null, and no legislative act is valid without their participation. These powers are therefore indivisible and cannot be exercised in part.

The nature of these powers exercised in the colonies is identically the same as in England. In fact the same powers govern the mother country and its dependencies which are submitted to the same sovereignty. The same Sovereign reigns over the whole British Empire, and everywhere the same power is exercised. How can this power which is indivisible in London and Ottawa, be divisible in Quebec, Toronto or Halifax, or be more divisible in Quebec, Toronto and Halifax than in Ottawa.

The Sovereign could come and personally exercise the federal power in the Dominion and the local power in the provinces as he does in London, but by reason of the physical impossibility of his simultaneous presence in the United Kingdom and in the colonies, they are exercised in the dependencies of the Empire by his representatives.

In both public and private law there is a principle equally correct that the powers exercised by the representative are, unless limited, identically those of the person represented. So, the Union act not containing any restrictions, the Lieutenant Governors as representatives of the Sovereign, exercise Royal power, one and indivisible, within the limits of the provincial jurisdiction, as the Governor General does within the limits of the federal jurisdiction, and, with the exception of the modifications necessarily imposed upon this power, owing to the conditions of dependence arising from the colonial relations to the mother country, they both exercise them all, and the possession of any of these powers necessarily brings with it the enjoyment of the others.

Can it be otherwise with legislative power and executive power than it is with judicial power which is the third

division of public power! Was a judge ever known not to exercise all the powers of his jurisdiction? Judging between A and B and not judging between C and D, *in pari materiâ*. Deciding upon a sale without the power of deciding upon an exchange. Exercising jurisdiction in contentious proceedings and not in non-contentious proceedings. Can one be a judge in part, by halves, thirds or quarters. Is it not true, on the contrary, that justice is rendered in its entirety or not at all. One is judge in all or not at all.

On the other hand how could the Sovereign appoint a judge for isolated acts? The person whom he appointed would then be an arbitrator and not a judge. The judicial power is as indivisible as the other powers. It is as much so but not more so than the other powers. In fact, all the branches of power whose division is only conventional, are in this respect identically the same and form but one whole.

Sovereignty, like jurisdiction, is indivisible, and the crowned head which fills high functions, must essentially fill all. If it be clothed with power to fill one, such power equally applies to all? Royal power can no more be divided than the judicial power. One can no more be king in part than judge in part.

Thus then, in the same manner as the Union Act recognizes, by conferring *nominatively* upon the Lieutenant Governors the power of convening the Legislative Assembly, under the Great Seal of the Province, *in the name of the Queen* (section 82), and upon the Lieutenant Governor of the Province of Quebec, of filling vacancies in the Legislative Council, by a similar instrument *in the same name*, the Privy Council, by recognizing their power to exercise a right appertaining to the royal prerogative, that of claiming the right to escheats, has recognized all the others.

Driven to their last entrenchments by these articles of the Union Act, which recognize in express terms the right of

the Lieutenant Governor to represent the Queen, or what comes to the same thing, of acting *in her name*, in the convening of the provincial legislatures and the appointment of legislative councillors, the counsel for the Federal Government endeavored to elude them by a sophism, stating that, without as a necessary conseqnence, giving the other powers, the Union Act contained a special mandate for these two purposes only.

We find in the study of the general character of the Confederation, and the interpretation of the Imperial Act which constituted it, the refutation of this paradox, which, however, implicitly admits that the Queen to a certain extent forms part of the provincial legislatures, since the Lieutenant Governors convene and prorogue them *in Her name*, and that the Queen exercises, in the Province of Quebec at least, executive power, as the Lieutenant Governor of that province appoints, *in the same name*, the legislative councillors.

The space devoted to the discussion of this question is proportionate to the importance of its solution ; since if it be shown that it is under a general and not a special delegation, that the Lieutenant Governors represent the Sovereign, the immediate consequence would be that the Queen forms part of the legislatures of the provinces, that these provinces are legislative bodies or parliaments and not large municipalities, still less *quasi corporations*, as the federalists pretend, and thus their pretensions, which are hostile to the provincial regime, would one after the other disappear. The fall of the key stone of the arch causes the whole building to crumble to ruin.

Before commencing this study, I will however say, in finally alluding to the judgment of the Privy Council, that the partisans of federal absolutism, in vain seek to conclude from the silence of the Lords of the Council, upon the question of the representation of the Sovereign by the

Lieutenant Governors, and of the participation of the Queen in the Provincial Legislatures, that they wished to reserve it, as such a reserve would be incompatible with the judgment which recognizes this double quality in one demand, which, in the contrary case, would have no reason for its existence.

On the other hand, by reversing the decision of the Supreme Court, the Privy Council confirmed that of the Vice-Chancellor and of the four judges of the Court of Appeals of Ontario, who, in maintaining, in favor of the provinces, the double question, decided in express terms, that the exercise of royal prerogative forms part of the functions of Lieutenant Governors.

II.

EXAMINATION OF THE QUESTION RESPECTING THE CONFLICT OF POWERS RAISED BETWEEN THE FEDERAL AND PROVINCIAL GOVERNMENTS.

The consequences which should follow the solution of this conflict are of great importance to the Province of Quebec. In fact, if the federal pretensions prevail and the principle of the inferiority of the provinces and the subordination of their legislatures to the federal power is well founded, less than fifty years will see their absorption in the central government; and the federal system will give place to that legislative union, which is so justly dreaded by our Province.

To thoroughly understand the nature and extent of the powers and limits of the jurisdiction of the federal parliament and of the local legislatures, a precise knowledge of their political situation at the time of Confederation and of the powers of their legislatures is necessary.

Integral portions of the British Empire, United Canada, Nova Scotia and New Brunswick, to which at first was li-

mited the federal compact, each possessed, under the ægis of England, whose power was felt rather in protecting than in coercing them, an independent and almost sovereign constitution. These constitutions, modelled on the British constitution, left them the absolute government of the internal affairs of the province, the control of their public funds, the enjoyment of their property and the disposal of their revenues of all kinds, even the territorial revenues which had been exchanged for a civil list. Within the sphere of their powers, their legislatures or provincial parliaments, protected by the principles of responsible government, worked freely and their internal action was not under the control of any foreign power.

These provinces, each of which was clothed with the totality of the powers, now possessed collectively by the federal and local governments, were therefore in the enjoyment of their complete political and legislative autonomy, guaranteed to them by treaties and Imperial statutes. The constitution of the provinces of Upper and Lower Canada had come to them by the Constitutional Act of 1791, which was not repealed by the Union Act of 1840, but simply modified to make it harmonize with the new system.

It is therefore to the Constitutional Act of 1791 that we must look for the origin of the powers of these legislatures, which were in force at the time of Confederation. These powers extended to every species of legislation, whether public or private, necessary for the good government and welfare of the country.

Thus, as we have stated, it extended to all legislation now divided between the federal parliament and the local legislatures.

A right or a power can no more be taken away from a nation than an individual, except by a law which revokes it

or by a voluntary abandonment. Is there, then, in the resolutions of the Conference of the Colonial delegates, held in Quebec, or in the Imperial act itself, one word which repeals these powers of the legislatures, or implicitly derogates therefrom ?

Article 29 of the resolutions says, with respect to the federal parliament: " The general parliament shall have power " to make laws for the peace, welfare and good government " of the federated provinces (saving the Sovereignty of " England) and specially laws respecting the following sub- " jects."

Article 43 of the same resolutions declares, respecting the legislatures:

" The local legislatures shall have power to make laws up- " on the following subjects :" The British North America Act, section 91, enacts :—" It shall be lawful for the Queen, " by and with the advice and consent of the Senate and " House of Commons, to make laws for the peace, order and " good government of Canada, in relation to all matters not " coming within the classes of subjects by this act assigned " exclusively to the legislatures of the provinces." Section 92.—" In each province the legislature may exclusively " make laws in relation to matters coming within the classes " of subjects, next hereinafter enumerated."

The optional terms : " shall have power ", found in article 29 of the resolutions, and the terms: " it shall be lawful " used in section 91 of the Union Act, are certainly not privative and cannot be understood, in the abstract, as derogatory to the local powers.

Allowing to the federal parliament a power of legislation already possessed by the provinces, the conclusion would, in general, be, that these powers are concurrently attributed to the Parliament and the legislatures; it is true that in the concrete, the terms: " the exclusive legislative authority of

the parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated," added to the first part of section 91, show that the section has, in that particular point, a limitative sense, and that it excludes the provinces from the exercise of legislative power upon those matters.

But what is the consequence of this exclusion, if not that it takes away these special powers from the local legislatures, to bestow them upon the federal parliament, and that the rest of the general powers are reserved to the provinces.

The powers of the provinces were then not revoked by the federal compact, which is now the British North America Act.

However, although neither the actual nor the implied sense of the Federal Union Act, founded upon the resolutions, implies a derogation from their powers, if the provinces to which these powers belong, have been themselves destroyed as corporations, or if the constitutions which had conferred these powers upon them had been since repealed, to make room for other provinces and to other constitutions, it is unquestionable that the extinction of the corporation, brought with it the dissolution of the constitution, or that even, without the extinction of the province, the revocation of the constitution, would have brought about *pleno jure*, the repeal of its powers. It is then these two questions that should be examined.

III.

DID THE OLD PROVINCES PRESERVE THEIR CORPORATE IDENTITY UNDER CONFEDERATION?

A distinction must here be made between the former province of Canada and the other provinces, as those of Nova Scotia and New Brunswick, which entered into the federal compact, under their old corporate names.

Under the constitutional Act of 1791, Upper and Lower Canada formed each a province separately constituted under the names of the provinces of Upper and Lower Canada. Reunited by the Union Act of 1840, they since then formed only one province, under the name of the province of Canada.

Under the British North America Union Act, they were again disunited and made into two separate provinces, called the provinces of Ontario and of Quebec ; but did they again become in reality what they were under the act of 1791, although having different names ? Has this difference in name and in territorial boundaries, effected a difference in their identity, and can it be said that they have become new corporations ? Have they not rather remained as they were, under the Union Act of 1840, as well as Nova Scotia and New Brunswick.

The maxim of law *Nil facit error nominis, cum de corpore constat*, a maxim of universal application in all legal matters, which declares that the name does not affect the substance so long as its identity is manifest, seems to settle the question.

The only difference in the result is, that, in place of entering the confederation under only one name and as a single member of the Union, the two provinces entered it under two different names and as two members of the Union. With the exception of the federal powers they are, moreover, each clothed with the same powers, as both were before and as the other confederated provinces remained, having each one and the same constitution.

I do not see, either in the resolutions of the conference, or in the federal act, any provision which would give a pretext to the pretension that, in entering confederation, the provinces lost their former identity to acquire a new one.

The preamble of the act which states : "Whereas the pro-
" vinces of Canada, Nova Scotia and New Brunswick have
" expressed their desire to be federally united into one Do-
" minion under the Crown of the United Kingdom of Great
" Britain and Ireland, with a constitution similar in prin-
" ciple to that of the United Kingdom," and section 3, which declares : " It shall be lawful for the Queen, by and with
" the advice of Her Majesty's Most Honorable Privy Council,
" to declare by proclamation that, on and after a day there-
" in appointed, not being more than six months after the
" passing of this act, the provinces of Canada, Nova Scotia
" and New Brunswick shall form and be one Dominion un-
" der the name of Canada; and on and after that day those
" three provinces shall form and be one Dominion under
" that name accordingly," reject that inference.

Section 5, which enacts : "Canada shall be divided into
" four provinces, named Ontario, Quebec, Nova Scotia, and
" New Brunswick," makes the contrary decision absolute.

It was then identically the old provinces which united to form a new government and to constitute a federal dominion, without losing their identity and without ceasing to be, what they had been, distinct governments. It is not then from the Dominion that the provinces, which had never ceased to exist, arose, but it was the provinces that created the Dominion and which were transformed into a new political body, without ceasing to exist in their former condition.

IV.

DID THEY RETAIN THEIR FORMER CONSTITUTION.

Is the constitution, given to them by the federal compact, their old constitution, modified to suit the new order of things, or is it a new constitution?

It is necessary, first, to know what were the organic characteristics of the old constitution. Let us confine ourselves to the constitution of the provinces of Upper and Lower Canada and to that of the Province of Canada. These constitutions were formed upon the model of the British constitution.

The executive power resided in the person of the Sovereign, represented by the Governor General or a Lieutenant Governor, and the legislative power resided in a legislature, sometimes called the Provincial parliament, composed of three branches: the governor or lieutenant governor representing the Sovereign, the legislative council, appointed by the governor, and a legislative assembly or house of assembly elected by the people. The parliament was convened by the governor in the name of the Sovereign, it was prorogued in the same manner, and the laws were assented to in the same name by the same officer. Let us see what are, on the same subjects, the provisions of the federal compact in the constitution of the provinces.

Section 58, which immediately follows Title V.—*Provincial Constitutions. Executive power.*—vests the executive power and one branch of the Legislative power in the person of the Lieutenant Governor whose appointment is provided for in these words: "For each province there " shall be an officer styled the Lieutenant Governor, appoint- " ed by the Governor General in Council, by instrument " under the great seal of Canada."

71. "There shall be a legislature for Quebec, consisting " of the Lieutenant Governor and of two houses, styled the " legislative council of Quebec and the legislative assembly " of Quebec.

82. "The Lieutenant Governor of Ontario and of Quebec " shall, from time to time, in the Queen's name, by instru- " ment under the great seal of the province, summon and " call together the legislative assembly of the province."

90. "The following provisions of this act respecting the "parliament of Canada, namely, the provisions relating to "appropriation and tax bills, the recommendation of money "votes, the assent to bills, the disallowance of acts, and the "signification of pleasure on bills reserved—shall extend "and apply to the legislatures of the several provinces as if "those provisions were here re-enacted and made applicable "in terms to the respective provinces and the legislatures "thereof, with the substitution of the Lieutenant Governor "of the province for the Governor General, of the Governor "General to the Queen and for a Secretary of State, of one "year for two years, and of the province for Canada."

55. "Where a bill passed by the Houses of the Parlia- "ment is presented to the Governor General for the Queen's "assent, he shall declare, according to his discretion, but "subject to the provisions of this act and to Her Majesty's "instructions, either that he assents thereto in the Queen's "name, or that he withholds the Queen's assent, or that he "reserves the bill for the signification of the Queen's plea- "sure."

It is objected to the analogy, which the partisans of the provinces find between the executive and legislative powers conferred upon the former governors and lieutenant governors and upon the old provinces, that under the new system, the sovereign does not exercise the executive power as under the old, through the governor, who represented him, and by whom he was directly appointed; that under the new system the Lieutenant Governor, in place of being appointed by the Queen, is appointed by the Governor General, of whom, and not of the Sovereign, he is the representative, and that the Lieutenant Governor, instead of being an Imperial, is a federal officer.

Secondly, that the Sovereign is not a branch of the legislature of the provinces, because the lieutenant governor,

clothed with secondary powers as just stated, does not represent the Sovereign as the first branch of the legislative authority.

The answer to these objections is based upon the fundamental principles of the British constitution, upon which depends the Imperial Sovereignty itself, and the constitutional existence of the colonies, which are: That the executive power of the nation resides in the person of the Sovereign, as the chief magistrate of the realm, and the legislative power in the parliament, composed of the Sovereign himself, and the other two branches of the nation, the House of Lords and the Commons. That it is from the Sovereign and the parliament thus composed, that is derived the source, principle and end "*fons, principium et finis*" of all power.

According to the Constitutional doctrine, as already stated, all legislative and executive power, granted by England to her colonies, is a delegated power, the legislative power, by the Parliament, of which the Sovereign is the first branch, and the executive power by the Sovereign alone, of whom the colonial governors are the representatives, in the executive government as well as in the legislatures. The authority of the governors appointed by the Sovereign is in no sense personal. It is in the name of the Sovereign that they exercise it, in virtue of a Commission, which might be assimilated to what is, in the civil law, an ordinary mandate.

In political as in private law, in the absence of any provision specially applicable to the subject, recourse must be had to the common law, to ascertain the relations between the government and the governed. This rule is admitted in England, where, for instance, the publicists hold, as a doctrine, that the hereditary right to the Crown is governed by the law of ordinary successions. It was thus that on the death of Edward VI without children, the Crown, like the large baronies, devolved, in default of other heirs male of

the late king Henry VIII, to his two daughters, Mary and Elizabeth, but the former excluded the latter, to avoid a plurality of Sovereigns.

Applied to the powers of lieutenant governors, the rules of mandate, which, being drawn from the civil law founded upon natural reason, are common to all civilized nations and are the same in England as in Canada, clearly show how the federalists are in error, when they hold that the Lieutenant Governors, appointed, not directly by the Crown, but by the Governor General, do not represent the Sovereign, but are the officers of the Governor General and of the federal executive government.

One of the fundamental principles in matters of mandate is that the persons commissioned by the mandatary, with the consent or by order of the mandator, to execute the mandate, are not responsible towards the mandatary personally but to the mandator, whom they represent for all the purposes of the mandate.

Here, the Governor General, appointed by the Sovereign under the federal act, appoints the Lieutenant Governors. But can it be doubted that the Governor General, having made the appointment in the name of the Queen, made it for her, that the Lieutenant Governor is not his servant, but became, as the Governor General himself, one of Her Majesty's officers, and that, in the performance of the duties conferred upon him, he represents the Sovereign.

It cannot be, and it is not denied that, in the cases specially provided for, the Lieutenant Governor is subject to the control and under the orders of the Governor General; thus being subject to dismissal by the Governor General, the Lieutenant Governor is obliged to obey his commands whenever it concerns the execution of this power and of anything connected with it.

But can it be maintained that, apart from these cases, the Lieutenant Governor is under the control of the Governor General, that he comes under the category of federal officers, either old or new, transferred from the old provinces to Canada, under section 130, or appointed under section 131, which gives to "the Governor General in council the power "to appoint such officers as he deems necessary or proper for "the effectual execution of this act", who are officers of Canada and are under the orders and direction of the Governor General himself?

Not only is there nothing in the letter of the law which justifies the assertion that the Lieutenant Governor does not represent the Sovereign, or that he is an officer subordinate to the Governor General, but the nature of the functions, which he exercises in virtue of the federal act and under public law and constitutional usage, is essentially opposed to it.

What are his functions? The executive power resides in his person, by section 58. He is assisted by an executive council, sec. 63.

Sec. 65. "All powers, authorities, and functions which "under any act of the parliament of Great Britain, or of the "parliament of the United Kingdom of Great Britain and "Ireland, or of the legislature of Upper Canada, Lower Ca- "nada, or Canada, were or are, before or at the Union, vested "in or exercisable by the respective governors or lieutenant "governors of those provinces, with the advice, or with the "advice and consent of the respective executive councils "thereof, or in conjunction with those councils, or with any "number of members thereof, or by those governors or lieu- "tenant Governors individually, shall, as far as the same "are capable of being exercised, after the Union, in relation "to the government of Ontario and Quebec respectively, be "vested in and shall or may be exercised by the Lieutenant

" Governor of Ontario and Quebec respectively, with the ad-
" vice or with the advice and consent of, or in conjunction
" with the respective executive councils, or any members
" thereof, or by the lieutenant governor individually, as the
" case requires, subject nevertheless (except with respect to
" such as exist under acts of the parliament of Great Britain,
" or of the parliament of the United Kingdom of Great Brit-
" ain and Ireland) to be abolished or altered by the re-
" spective legislatures of Ontario and Quebec."

Now as we have already seen, by the Union Act of 1840, which in these respects was in force at the time of confederation and which confirmed the provisions of the constitutional act of 1791, the governor of the province of Canada :

1. Convened the parliament in the name of Her Majesty (sec. 4) as he still does it under section 81 of the federal union act.

2. Prorogued it in the same name (sec. 30).

3. In the same name of Her Majesty, he gave assent to or refused to sanction bills (sec. 37).

4. And, a remarkable characteristic by section 59 it was enacted, that the exercise of the functions of governor should be subject to Her Majesty's orders. A provision which is not repeated by the confederation act, but is still in force under the section 65 hereinabove recited of that act. If that law intended to subordinate the exercise of the functions of Lieutenant Governor to the control of the Governor General, as his officer, would it not have modified the provisions of section 59 of the Union Act of 1840 in order to apply it to the Governor General instead of simply keeping it in force and leaving the exercise of the functions of Lieutenant Governor to be subject to the orders of Her Majesty.

It is equally to be noticed that the powers of the governor, created by the constitutional act of 1791, are not only not

repealed, but, on the contrary, are re-enacted in the Union Act of 1840 and, for further security, the latter law has a special provision that the powers conferred upon the governors by the old constitution are continued by the new.

Let us, however, continue the enumeration of the powers of the Lieutenant Governor under the federal constitution.

He forms, as we have already seen, the first branch of the legislature (sec. 71).

He appoints, by instrument under the great seal of Quebec, the legislative councillors, *in the name of the Queen*, and not in that of the Governor General (provision re-enacted from the preceding constitutions of 1791 and 1840).

If a vacancy in the Legislative Council of Quebec should occur, by resignation or otherwise, the Lieutenant Governor, in the name of Her Majesty, fills the vacancy, by appointing a new legislative councillor (sec. 75).

He appoints the speaker of the Legislative Council of Quebec (sec. 77). It is not here stated that it is in the name of Her Majesty, but was not that omitted to avoid a pleonasm ?

He fixes the time for the elections and causes the writs to be issued (secs. 84 and 89).

No appropriation of the public revenues or taxes can be made by the legislature, unless previously recommended by the Lieutenant Governor (secs. 54 and 90).

V.

NATURE OF THE FUNCTIONS OF LIEUTENANT GOVERNORS.

Are they not royal functions which the British Sovereign, as chief executive magistrate of the nation and as the first branch of parliament, exercises alone in England and which none other than his representative can exercise in a colony ?

These functions, with which the Lieutenant Governors are invested by the constitutional acts, confirmed by the federal compact and by the latter act itself, are numerous, as we have just seen, but were they only to include two of the powers explicitly granted by the federal Union Act, the appointment of legislative councillors in the name of the Queen (sec. 72) and the convening of the legislature in the same name (sec. 82), this double prerogative affords, beyond doubt, the proof that he is the mandatary of the Sovereign and not of the Governor General. In fact, he acts directly in the name of the Queen in the exercise of these two powers and not in that of the Governor General : the choice of councillors no more rests with the Governor General than that of any other provincial appointment, and to the Queen alone belongs the power of convening any legislature in her empire, from the Imperial Parliament to the legislative body of the humblest colony, since this convening is a prerogative of the executive, residing solely in the Sovereign and, in the colonies, is exercised through the governors.

I have just shown that this power is not granted to the Governor General, except in the federal sphere and not at all within the scope of provincial powers, and that the lieutenant governors cannot in this respect be his mandataries.

In whose name then do they act in the exercise of this power? If it is not in the name of a third person, *in nomine alterius*, that is to say in the name of the Sovereign, it is in their own name that they exercise it and the federal Union Act, has made of them, who were representatives of the Sovereign, personal grantees of the royal authority. In assenting to this act, the Queen divested herself in their favor of her royal prerogatives; she abdicated executive power in their favor, and made of them as many sovereigns as there are provinces.

Now, this abdication, if we can for a moment suppose such an hypothesis, even for the purpose of controverting it, of a part or even the smallest portion of the royal prerogative, made by parliament, would be an alienation of imperial sovereignty and would be equivalent to a recognition of the independence and an emancipation of the colony, in whose favor it was made.

For, sovereignty is one and indivisible and we cannot take one attribute from it without destroying the power of the whole. Thus the personal delegation of the executive power to the Lieutenant Governors, if it be valid, carries with it the rupture of the colonial tie and the independence of the provinces and, by reaction, the rest of the federal Union Act has become worthless, as legislation, *ultra vires*, over a foreign country ; a most ridiculous proposition indeed ! and the sections of the imperial act delegating the exercise of the executive power to the provinces, would remain without force.

However, if the Lieutenant Governors are not the chief executive magistrates of the provinces, as mandataries of the Sovereign, one of these conclusions is strictly true. But, as neither can be true, it follows that the proposition, already sufficiently abnormal in itself, that, in the exercise of executive power, the Lieutenant Governors are not the representatives of the Queen, is much more so in its consequences, and its falseness cannot be subject to the slightest doubt.

What has just been stated as to the falseness of this proposition, applies with equal, if not greater, force, to the assertion that the Queen does not, as in the federal parliament, form part of the provincial legislatures, because the federal Union Act (section 17) states that "there shall be one "parliament for Canada, consisting of the Queen, an upper "house, styled the Senate, and the House of Commons" and that section 71 simply states, "there shall be a legislature

" for Quebec, consisting of the Lieutenant Governor and of " two houses, styled the Legislative Council of Quebec and " the Legislative Assembly of Quebec."

From the difference in the context of these two sections, and the omission to state, in section 71, that the legislature is composed of the Queen for whom the Lieutenant Governor is substituted, it is concluded, that the legislative authority of the provinces is not a royal authority, that the provincial legislatures are not legislative bodies, recognized as such, that the provinces are, with respect to the federal parliament, only large municipalities and their legislatures, simply municipal councils. By way of demonstration there is added, as a final argument, an imperious, irresistible and absolute reason, that their legislatures are not, as the federal legislature, parliaments.

If, by the intermediary of the Lieutenant Governors of each province, the Queen is not a branch of the legislature, with the legislative assembly in Ontario and the legislative assembly and legislative council in Quebec, how then is such legislature composed ? It certainly is not by the Governor General whose powers are confined to the federal parliament. Can it be by the two Houses alone, whose acts assented to by the Governor General, not for the Queen but in his own personal name, would not be subject to royal authority ?

This assertion, assuredly more than strange, cannot be received and it would be puerile to discuss it. It would moreover be contrary to the text of sec. 71, which states, that the legislature consists of the Lieutenant Governor and of two Houses. Hence the same absurdity which is attached to the idea that the Lieutenant Governor exercises the executive power in his personal quality, or as representing the province, applies to the proposition that he intervenes in his own name or as representing the people, already represent-

ed by the House of Assembly and not as representing the royal prerogative and as mandatary of the Sovereign.

We may here repeat what we have before said of the delegation made to the Lieutenant Governors of the executive power by the Queen, and the abdication of sovereignty, which would be implied by that delegation of power to these officers in their personal names or as representing the the provinces, to apply it to the legislative power, which might be done with even greater force ; for, according to the ordinary principles of legislation, the legislative authority, considered by publicists as a primordial power, surpasses the executive power which it includes and which springs from it ; but it would be a useless repetition, as the reasoning can be easily supplied.

Is it not evident to the least heedful mind that both from the legislative and executive point of view, the royal prerogatives, which, in England, are not the personal appanage of the Sovereign, but are the property of the people, and which the king holds in trust to exercise them in the interest of the British nation, are equally exercised in the provinces by the king, not more however to his personal profit than in the mother country, but for the people of the provinces, with respect to whom these prerogatives have not lost their character of a trust, and that, not being able to exercise them himself, he has delegated their exercise to the lieutenant governors, who are his mandataries ?

Is it not equally clear that if the Federal Union Act does not repeat, with respect to the two provinces, the provision contained in section 9 : " the executive government and " authority of and over Canada is hereby declared to con- " tinue to be vested in the Queen," (a provision whose application the federalists wish to limit to the federal government) and does not state, as in section 71, that like the Parliament, the legislature shall consist of the Queen,

such omission is not due to the intention to withdraw the exercise of these powers from the authority of the Crown nor to deprive the provinces of the benefits of the royal prerogatives, but to the desire to avoid monotony in the wording of the law and to a fear of pleonasm. Let us now come to the objection that the legislatures are not parliaments.

VI.

PRIVILEGES, POWERS AND RIGHTS OF THE LEGISLATURES.

It must be admitted, that, in a discussion of such importance, when the legislative existence of the provinces is concerned, it is painful to be obliged to discuss a question so puerile as that raised by the objection—Are the legislatures parliaments? Doubtless in the grammatical sense of the word, they are, as a parliament is "a meeting or assembly of persons for conference or deliberation"; but in its judicial sense, legislatures are not parliaments, except in those countries where the word is used to signify the legislative body, and they are not so in countries where they are otherwise called. That is to say, the word has only the value given it by the custom of different countries, and it has no accepted determined meaning, to signify the powers belonging to one or more legislative assemblies.

Thus in Italy, in Saxony, in the Duchy of Baden, in Sweden, in Roumania, in England and in several of its colonies, New South Wales, Queensland, South Australia, Tasmania and Victoria, the legislatures are called *parliaments;* in Austria, the legislative body is called *Reischsrath*, *Rigsdag* in Denmark, *Reichstag* in Germany, Hungary and Wurtemburg, *corps législatif* in France, *Boulé* in Greece, *Cortes* in Spain and Portugal, *Congress* in the United States, and in several countries of South America, Brazil, Peru, Honduras, &c. If

for the first named countries it be asked, is the legislature a parliament? The reply would be in the affirmative, and in the negative for the others.

If it be asked whether in the old provinces, which now form the Canadian Confederation, the legislatures, those of Quebec and Ontario for example, were parliaments, the answer would be in the affirmative, for it cannot be doubted that the provincial legislatures were indifferently called parliaments or legislatures.

It was held that they were *mutatis mutandis* clothed with the same power as the British Parliament, and until the Union Act of 1840, which conferred upon the legislative assembly the absolute right of electing the speaker, when the latter claimed from the governor or lieutenant governor the confirmation of his election, he claimed the parliamentary privileges as recognized in the English Parliament.

On the 15th October, 1792, Governor Simcoe, in proroguing the first session of the legislature of Upper Canada, speaking of the new constitution, said: "This province is "singularly blessed, not with a mutilated constitution, but "with a constitution which has stood the test of experience "and is the very image and transcript of that of Great Bri- "tain."

The name of parliament was given to the legislatures of the old provinces in a host of official, parliamentary and legislative documents and even in acts of the British Parliament itself. The word parliament, as a synonym of legislature, was so familiar under the old system, that the resolutions of the Quebec conference make use of both terms jointly to signify the legislative body of the Confederation.

"There shall be a general legislature or parliament for the federated provinces, composed of a Legislative Council (the

idea of the word Senate for the upper House had as yet not suggested itself to any one) and a House of Commons," says the sixth of these resolutions. The forty-first says: " The " governments and parliaments of each province shall be " constructed in such manner as the existing legislature " of each shall think fit."

It is only since a minister of justice drew the attention of the government of Quebec to the improper use, according to him, of the term " parliamentary elections" employed in a provincial statute, that the question was raised, no longer as a technical question of phraseology, but as a fundamental question to create a distinction unfavorable to the provinces, between their legislative authority and that of the federal government.

At first sight one would be inclined to believe that it requires a very malevolent spirit to thus fasten upon a word, improperly used perhaps, in order to draw from it an inference of such grave import as that which is sought to be established against the provinces and to prove their inferiority with respect to the federal power.

The reasoning of the federalists, however odd the form of the objection, is really that the Federal Union Act, having clothed the federal legislature with the name of Parliament and given power to the latter (sec. 18) to define its privileges, immunities, and powers, provided that they should not exceed those enjoyed and exercised by the House of Commons, having called the legislative bodies of the provinces by the simple name of legislatures, and not having conferred upon the latter the same privilege of defining their immunities and powers, the Imperial Parliament, placed the provinces with respect to legislative power, in an inferior position to the Federal Parliament.

The answer to the first point is simple. We have seen that in legislation, the name given to a legislative body has

nothing to do with the privileges enjoyed by it, and in no way measures their extent.

As to the second point, it is possible that the local legislatures have been endowed with less power than the Federal Parliament, in so far as they do not enjoy all the privileges and immunities which usage has conferred upon the British Parliament, and which the latter has bestowed upon the Federal Parliament.

But those powers that were exercised by the old legislatures and which were vainly contended against under the old system, in what, after all did they consist, if not in the freedom of the members from arrest in going from their homes to Parliament or on their return, and during the session, and in the power of imprisoning any person who interfered with their privileges?

It does not come within the scope of this work to discuss the correctness of the opinion that the local legislatures do not possess the same powers as the Federal Parliament, on both these matters, and to maintain that, by the common law, the legislatures have the right to imprison those in contempt of their authority, and that they could enact a law granting freedom from arrest to their members going to or returning from and during the session, for, from the fact that the legislatures have not these two powers equally with the Federal Parliament, what can result that could be injurious to the provinces within the admitted sphere of their attributes, and what superiority could be drawn therefrom in favor of the federal parliament from this inequality? These immunities, if enjoyed by it to the exclusion of the provinces, are so enjoyed, not because it is called *parliament*, but because they were conferred upon it by an Imperial constitution, and would belong to it equally if it were called Diet or Congress. Once more, the name does not affect the substance and is merely accidental and of no consequence?

We may then conclude, that if the constitutional act called the federal legislature "parliament" and the legislative bodies of the provinces simply "legislatures," this difference of name arises simply from the desire to avoid the repetition of the same word and the confusion that might thereby result ?

Besides in respect of both form and substance, this difference of name and inequality of powers cannot, upon the other points, give rise to any subordination of the provinces to the federal power.

The federalists continue their argument and say: "the inferiority of the provinces and their subordination to the federal government is further shown by the right of *veto* or disallowance which the Governor General has over local acts. It is true that the Lieutenant Governor sanctions the provincial laws, but it is, in the terms of section 90 in the name of the Governor General that he does it, and as to this sanction, to the disallowance of these laws and the signification of good pleasure with respect to the bills reserved, the Lieutenant Governor is with respect to the Governor General in the same relation as the latter is to the Queen."

Let us consider this argument which is more specious than sound, so as to show its inefficiency as a proof of the subordination of the legislatures with respect to the federal government.

Sovereignty alone can give rise to an absolute right to legislate for a dependent people. In this respect, Canada and the provinces composing one nation, subject to the same Imperial authority, cannot be mutually placed in the relations of sovereignty and dependence. Consequently, there cannot be legislative subordination of the one towards the other.

Legislative dependence of one country towards another, a result of political supremacy, implies essentially, in favor of the sovereign country, not only the absolute power of legislating for the subject country but also of repealing the laws of its legislatures. It is thus that under the moral guarantee of treaties and the reserve of their priviliges the English Parliament may, of right, exercise legislative supremacy over the colonies, whose legislative power is subject to it. Can it be stated that the Federal Parliament has either of these powers with respect to the provinces?

This subordination, it is thought, is found in the *veto* possessed by the Governor General over provincial laws. This is an evident error, occasioned by ignorance or forgetfulness of the fundamental principles acknowledged in matters of legislation.

The control which England, in theory, possesses over the colonies, and which would be exercised in legislating for them or in repealing their legislation, is an act of legislative power, that is to say, of Parliament, whilst the *veto* or disallowance of the laws is an act of executive power, that is to say, of the Sovereign acting with the advice of his council, and it is the same for the disallowance by the Governor General of provincial laws.

This disallowance which is only a prohibition from carrying into execution a colonial law, which might trench upon Imperial prerogatives or give rise to serious conflict between the rights of the empire and those of the colonies, has always been and is still considered in England, not as an act of legislative but of executive authority.

For the same reason of avoiding encroachment by local legislation upon imperial interests and federal legislation, and conflicts between both legislations, and to facilitate this double supervision, which is better exercised upon the spot

than in England, the Federal Union Act placed this right of *veto* in the hands of the Governor General; but it is not as a branch of the Parliament and as administering legislative authority that he exercises such right, but as representing the executive authority of the Confederation, and in the exercise of this authority he acts upon the advice of his council, who are responsible for such, as for all other advice. If it is not as a branch of Parliament and in his quality as representing the legislative authority, that this officer disallows provincial laws, this disallowance does not give rise, in his person, to a supremacy over provincial legislation.

A remarkable feature of the disallowance by the Governor General and which proves that it is not in his own name, but in that of the Queen that he exercises such right, is that the federal laws assented to by him are themselves subject to the royal disallowance.

The Governor General assents to the federal laws in the name of the Queen, who, at pleasure, disallows them, in the same manner as was done under the old provincial system, under which the Governor or Lieutenant Governor, in the same name of the Queen, assented to or reserved the old provincial laws. The relations of the provinces with the Sovereign were then had by the intermediary of their governors. By the Union Act, a second, the Federal Government, is placed between the provinces and the Sovereign. The Governor General is the head of this new government. As these provinces had become numerous and as direct communication between the Imperial Government and them would have caused confusion, the Union Act found it more simple to confide the whole to one intermediary, who is the Governor General.

It was to this officer of the Imperial Government that was delegated the choice of provincial Governors and the

disallowance of local laws, in the same mannor as the assenting to and reserving of federal laws had been entrusted to him.

This latter assent is given by him in the name of Her Majesty, and can he act otherwise when he disallows or ratifies the provincial laws assented to or reserved by the Lieutenant Governor. On the other hand, it is in the name of the Governor General that the Lieutenant Governor gives this same sanction to provincial laws or it is for his good pleasure that he reserves them, but can it be doubted that here again he acts in his official capacity, as the representative of Her Majesty, to whom all power of assent or of disallowance over the legislation of her colonies belongs?

That which completes the proof of the official agency of the Governor General when he disallows provincial laws, is that it is with the advice of his cabinet that he acts, and that this cabinet is responsible to the provinces, represented in the Federal Parliament by their members, for the advice which it gives on such point, just as it is responsible for all the other official acts of the Governor General.

No inference therefore, drawn from the Federal Union Act, rebuts the assertion that the confederated provinces are identically the old provinces, with the exception, however, of the provinces of Quebec and Ontario, divided into two, as they were before the Union Act of 1840, under the constitutional act of 1791.

I will now show that the Union Act itself, in express terms, establishes this proposition.

The preamble states: "Whereas the *provinces of Canada*, "*Nova Scotia and New Brunswick* have expressed their de- "sire to be federally united into one Dominion."

"Section 3. "It shall be lawful for the Queen..... to de- "clare.....that.....the *provinces of Canada, Nova Scotia and*

" *New Brunswick*, shall form and be one Dominion under " the name of Canada."

Section 5. " Canada shall be divided into four provinces " named Ontario, Quebec, Nova Scotia and New Brunswick."

And the act continues thus to speak of the provinces, whose existence, as old provinces, it recognizes, without saying a word of the creation of new provinces.

We have just seen that, notwithstanding what is said by the federalists, the legislatures are composed of the Queen, represented by the Lieutenant Governor, and, for Quebec, of the Legislative Council and Legislative Assembly ; that the executive power resides in the person of the Lieutenant Governor, as representing the Sovereign, and that the organization of powers is the old provincial organization, notwithstanding the disallowance of the bills of the legislature by the Governor General and the appointment and removal of the Lieutenant Governors by that officer.

This organization of powers would alone be sufficient to show that the constitution of the provinces remained identically the same, but the constitutional act goes further and completes this proof, by declaring (sec. 88) that " the con- " stitution of each of the provinces of Nova Scotia and " New Brunswick shall continue as it exists at the Union."

If the intention of the Imperial Government was not to endow the provinces with their former constitution, why this special provision for the provinces of Nova Scotia and New Brunswick, which were in the same position as Ontario and Quebec ?

If these two latter provinces were not included in this provision, it was because, being divided under Confederation, the constitution made for them when they were united would not fit into the federal system.

The Union Act, therefore, contains no provisions respecting the constitution of these two provinces, only because of this disunion and the inequality of their provincial representation ?

The third paragraph of the preamble of the Union Act which states : " it is expedient, not only that the constitu- " tion of the legislative authority in the Dominion be pro- " vided for, but also that the nature of the executive govern- " ment therein be declared " and which does not extend this provision to the provinces, corroborates this assertion.

It was decided at the Quebec conference (art. 41) that : " the local government and legislature of each province shall be constructed in such manner as the existing legislature of each such province shall provide." On the 2nd of February, 1865, in the House of Assembly of the Province of Canada, at the opening of the debate upon the resolutions of the conference, attorney-general McDonald announced that, after the Confederation scheme was adopted, the government proposed to lay before the House a measure for the organization of the local governments and, throughout the discussion, such future action of the legislature was constantly alluded to.

This proposal was not carried out, but the resolution above cited was adopted by the House.

Whatever may have been the reason of this omission, it is none the less true that it was the well-understood intention of the legislature itself to form the constitution of the provinces of Ontario and Quebec, and it is in the highest degree improbable, that the Imperial Parliament, which considered the resolutions of the conference, ratified by the legislature, as a compact entered into between the provinces, upon which the new system was to be based, a compact which it respected in all other points, would have

wished to derogate from that one, that is to say, arrogate to itself the power of making a new constitution for the provinces.

However, as the old legislatures, and especially that of the province of Canada, did not follow up the resolution of the conference ratified by the House, as has just been stated, leaving to them the duty of drawing up their provincial constitution under the Union, the Imperial Parliament thought it could not do better, in respecting the federal compact, than to continue the provinces in the enjoyment of their old constitutions, with power to amend the same, a power contained in the resolutions of the conference and which section 91 of the Union Act has repeated.

I have stated above that the powers of the provinces could not have been taken from them, except by the constitution or by an abandonment made by them, for it is one of the points of the doctrine hostile to local powers, that in entering into Confederation, the provinces returned to the Imperial government all the rights theretofore possessed by them, as well as all their property, so that a new distribution thereof might be made between them and the federal government.

This doctrine which exhibits the imagination of its inventors, does not, in an equal degree, show the solidity of their powers of reasoning, for not only do we not find one word in the resolutions of the conference, the parliamentary discussion, or the Union Act, which might be construed into such a voluntary renunciation of their autonomy by the provinces, but this supposition is contrary to all the political events, which preceded, accompanied and followed Confederation; it is altogether improbable and we must say is repugnant to common sense.

Why should the Province of Quebec, for example, have, on an inauspicious day, with utter want of thought, abandoned its rights the most sacred, guaranteed by treaties

and preserved by secular contests, and sacrificed its language, its institutions and its laws, to enter into an insane union, which, contracted under these conditions, would have been the cause of its national and political annihilation ? And why should the other provinces, any more than Quebec, have consented to lose their national existence and consummate this political suicide ?

This principle, that the provinces retained their old powers when they entered confederation and have continued to be governed by their former constitutions, was judicially consecrated by the court of appeal in the Tanneries affair *. At least the majority of the court decided in that sense. Let us cite the opinions of chief justice Dorion and of the late judge Sanborn.

DORION, C. J. " We know that by the confederation act the legislatures of the several provinces are not merely ordinary corporations, in the ordinary sense of the word. They are, no doubt, corporations in one sense which derive their authority from superior authority to which they are bound, but not in that limited sense in which we usually take the word corporation. There is no difference between the powers of the local and Dominion legislatures within their own spheres. That is, the powers of the local legislature, within its own sphere, are co-extensive with the powers of the Dominion government within its own sphere. The one is not inferior to the other. I find that the powers of the old legislature of Canada are extended to the local legislatures of the different provinces. We have a government modelled on the British Constitution. We have responsible government in all the provinces, and these powers are not introduced by legislators, but in conformity with usage. It

* This affair, which took place in 1874 and which caused a great sensation at the time, is too well known to require a more explicit designation.

is founded on the consent and recognition of those principles which guide the British Constitution. I do not read that the intention of the new constitution was to begin an entirely new form of government, or to deprive the legislature of any of the powers which existed before, but to effect a division of them; some of them are given to the local legislatures, but I find none of them curtailed.

"In substituting the new legislation to the old, the new legislature has, in all those things which are special to the Province of Quebec, all the rights of the old legislature, and they must continue to remain in the Province of Quebec, as they existed under the old constitution."

SANBORN, J. "The British North America Act, 1867, was enacted in response to the petition of the provinces of Canada, Nova Scotia and New Brunswick, as stated in the preamble of the act, to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom.

"The powers of legislation and representative government upon the principle of the British Constitution, or, as it has commonly been called, responsible government, were not new to Canada. They had been conceded to Canada and exercised in their largest sense from the time of the Union Act of 1840, and in a somewhat more restricted sense from the act of 1791 to 1840. The late Province of Lower Canada was constituted a separate province by the act of 1791, with a governor, a legislative council and a legislative assembly, and it has never lost its identity. It had a separate body of laws, both as respects statute and common law; in civil matters no powers that had been conceded were intended to be taken away by the British North America Act, 1867, and none, in fact, were taken away, as it is no

the wont of the British government to withdraw constitutional franchises, once conceded.

" This act, according to my understanding of it, distributed powers, already existing, to be exercised within their prescribed limits, to different legislatures, constituting one central legislature and several subordinate ones, all upon the same model, without destroying the autonomy of the provinces, or breaking the continuity of the respective provinces ; in a certain sense, the powers of the Federal Parliament were derived from the provinces, subject, of course, to the whole being a colonial dependency of the British Crown.

" The provinces of Quebec and Ontario are, by the sixth section of the act, declared to be the same that formerly comprised Upper and Lower Canada. This recognizes their previous existence prior to the Union Act of 1840. All through the act, these provinces are recognized as having a previous existence and a constitutional history, upon which the new fabric is based. Their laws remain unchanged and the constitution is preserved. The offices are the same in name and duties, except as to the office of Lieutenant Governor, who is placed in the same relation to the province of Quebec, that the Governor General sustained to the late Province of Canada.

" I think it would be a great mistake to ignore the past governmental powers conferred upon and exercised in the province, now called Quebec, in determining the nature and privileges of the legislative assembly of this province. The remark is as common as it is erroneous, that the legislatures of the provinces are merely large municipal corporations. It is true that every government is a corporation, but every municipal corporation is not a government. Consider the powers given exclusively to provincial legislatures. They have sole jurisdiction over education, pro-

perty and civil rights, the administration of justice and municipal institutions in the province, subjects which affect vitally the welfare of society. The very court, which enables us to determine the matter now under consideration, holds its existence by the will of the provincial legislature.

" No such powers were ever conferred upon mere municipalities in their ordinary sense. They are subjects which in all nations are entrusted to the highest legislative power. Legislatures, make laws, municipal corporations make by-laws. If these legislative powers, confided to provincial legislatures are not to be exercised in all their amplitude with the incidents attaching to them, they can be exercised by no other sovereign power, while our present constitution exists."

Let us now establish the position of the provinces, clothed with the fulness of political and civil rights proper to colonies forming an association or society subject to approval by England, for the purpose of having their general interests managed by one power. We say association or society, for a confederation is essentially a society or union of several states or provinces, which submit to a general power while each retains its own particular government, and the rules proper to civil societies, in the absence of agreement as to some particular points, should regulate them.

The general government can have only those powers which are conferred upon it by the confederated states. This government is essentially the creation of those states, as an ordinary partnership is the work of the partners.

In the absence of contrary provisions, the particular governments are managed by the organic rules which constituted them before forming the confederation, and preserve all the powers which belonged to them, if they do not delegate a part to the central government. In the case of the Cana-

dian confederation, the provinces did not attribute to the federal government powers of a nature different from those that each before possessed. They delegated to it a portion only of their local powers to form a central power, that is to say, they allowed it the management of their affairs of a general character, but retained their own government for their local affairs.

It was a concession of existing powers that was made to it and not a distribution of new powers. The powers of the central government came from the provinces, as those of an ordinary partnership come from the partners; to invert the order and state that the powers of the provinces come from the central government, would be to reverse the natural order of things, place the effect where the cause should be, and have the cause governed by the effect. Such is the error of those who pretend that the powers of the provinces come from the federal government and are of its creation; a fundamental and egregious error which has been the cause of all the false ideas that we have combated and of the inferior position attributed to the provinces!

We have said that if there is relative inferiority and superiority between the federal government and the provincial governments, such inferiority is to be found with the federal government, and the superiority with the governments of the provinces. But it is not necessary to make this comparison in order to establish their respective competence; let us rather say that there is equality between them or rather a similarity of powers, and that each of the two powers is sovereign within its respective sphere.

Blackstone says: "By sovereign power is meant the "making of laws, for wheresoever that power resides all "others must conform to and be directed by it, whatever "appearance the outward form and administration of the "government may put on."

According to this principle, whatever may be the respective importance of the powers conferred upon each of the governments in the exercise of their powers, each, having an independent authority not subject to revision by the other, is equal in competence.

In the United States, the central power is less powerful than that of the States; it is from the States that Congress draws its authority, and all powers, not conferred by the constitution upon Congress, belong to the States. Canadian federalists wish to lay down this principle of the constitution of the United States as special and exceptional, contrary to the principles of all other confederations and especially to that of the Canadian confederation. I maintain, on the contrary, that this superiority of the States over Congress is a general principle and is derived from the nature of confederations themselves; that the same principle prevails in the Helvetian and Germanic confederations and in all other possible confederations; that it is of the essence of the federal system, that the central government has only those powers which are conferred on it by the states and the latter retain the remainder, for the very simple reason, that the central government is the creation of the several governments that have given it the form and the totality of powers which they deemed suitable, and no more.

The application of these ideas renders all conflict impossible, since each of the governments remains absolute master and independent of the other within its sphere of authority, and assures, to the Canadian confederation, the triumph of legislative equality.

VII.

INTERPRETATION OF SECTIONS 91 AND 92 OF THE CONFEDERATION ACT.

Starting from the preconceived idea that the provinces are subordinate to the federal parliament, an application of this

principle has been sought in the distribution of powers made by sections 91 and 92 of the confederation act, in the text of these articles.

Let us read these sections with an unbiassed mind, so as to interpret them in the same manner as any other law, according to the ordinary rules.

"91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

1. The public debt and property;
2. The regulation of trade and commerce;
3. The raising of money by any mode or system of taxation;
4. The borrowing of money on the public credit;
5. Postal service;
6. The census and statistics;
7. Militia, military and naval service and defence;
8. The fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada;
9. Beacons, buoys, lighthouses, and Sable Island;
10. Navigation and shipping;
11. Quarantine, and the establishment and maintenance of marine hospitals;
12. Sea coast and inland fisheries;
13. Ferries between a province and any British or foreign country or between two provinces;

14. Currency and coinage ;

15. Banking, incorporation of banks, and the issue of paper money ;

16. Savings banks ;

17. Weights and measures ;

18. Bills of exchange and promissory notes ;

19. Interest ;

20. Legal tender ;

21. Bankruptcy and insolvency ;

22. Patents of invention and discovery ;

23. Copyrights ;

24. Indians, and lands reserved for the Indians ;

25. Naturalization and aliens ;

26. Marriage and divorce ;

27. The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters ;

28. The establishment, maintenance, and management of penitentiaries ;

29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects, by this act assigned exclusively to the legislatures of the provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces."

" 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say :—

1. The amendment, from time to time, notwithstanding anything in this act, of the constitution of the province, except as regards the office of Lieutenant Governor ;

2. Direct taxation, within the province, in order to the raising of a revenue for provincial purposes;

3. The borrowing of money on the sole credit of the province;

4. The establishment and tenure of provincial offices and the appointment and payment of provincial officers;

5. The management and sale of the public lands belonging to the province and of the timber and wood thereon;

6. The establishment, maintenance and management of public and reformatory prisons in and for the province;

7. The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for the province, other than marine hospitals;

8. Municipal institutions in the province;

9. Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes;

10. Local works and undertakings other than such as are of the following classes:—

a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

b. Lines of steamships between the province and any British or foreign country;

c. Such works as, although wholly situate within the province, are before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces;

11. The incorporation of companies with provincial objects;

12. The solemnization of marriage in the province;

13. Property and civil rights in the province;

14. The administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts ;

15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section ;

16. Generally all matters of a merely local or private nature in the province."

The dominant idea of these two sections is to attribute the power of legislating upon matters of general interest to Parliament and the power over matters of local interest to the provinces.

It is this double idea which section 91 and subsection 16 of section 92 set forth in stating: Section 91. " It shall " be lawful for the Queen, by and with the advice and con- " sent of the Senate and House of Commons (that is to say the " Parliament), to make laws for the peace, order and good " government of Canada, in relation to all matters not com- " ing within the classes of subjects by this act assigned ex- " clusively to the legislatures of the provinces," and subsection 16 of section 92, in placing under the legislative control of the provinces : " generally all matters of a mere- " ly local or private nature in the province."

The same idea was expressed in a different manner in the resolutions of the conference (article 29.) " The general " Parliament shall have power to make laws for the peace, " welfare and good government of the federate provinces " (saving the sovereignty of England) and especially laws " respecting the following subjects" : (that is to say, in short, upon the subjects enumerated in section 91 of the Confederation Act.)

And paragraph 37 of the same article 29, is in these terms : "and generally respecting all matters of a general character, "not specially and exclusively reserved for the local gov- "ernments and legislatures."

For the legislatures, article 43 says: "The local legis- "latures shall have power to make laws respecting the fol- "lowing subjects" (which are on the whole those enumerated in section 92 of the Confederation Act,) and paragraph 18 of the same article adds: "and generally all matters of "a private or local nature, not assigned to the general "parliament."

As we have seen, these general and local powers of the parliament and legislatures extended to objects specially set forth. The line of demarcation is found in the limits assigned to the two powers. It is true that paragraph 37 of article 29 of the resolutions of the conference assigned all general matters to Parliament and paragraph 18 of article 43 assigned local matters to the provinces, but such assigning had no definite character. From the nature of things, all the legislative powers of a nation are local powers in so far as they do not extend beyond the territorial limits of the country. It is only when two countries join together and submit to a general government, while preserving their local government, that the powers attributed to the central government become general and those reserved to the individual governments remain local.

Outside of this ascription, altogether arbitrary and conventional, there cannot be a general rule to establish the line of demarcation between these general and local powers. Thus, in stating that all matters of a general character, not reserved for the provinces, belong to Parliament, and those of a local nature, not assigned to Parliament, should belong to the legislatures, the resolutions of the conference stated nothing or only repeated that which had been de-

clared in the distribution of the special subjects assigned to each of the legislatures by the remainder of article 29 and by article 43.

As these articles, dealing, as has just been stated, with particular powers, might have omitted a large number, and as the working of the governments might be impeded by these omissions, the authors of the federal union act, who gave the finishing touch to the resolutions in England, felt that, to remedy this serious inconvenience, it was necessary to establish another line of demarcation and another rule of competence, by means of which they remedied this omission by having those omitted cases entered in one or the other category of powers and, to attain this end, they amended the resolutions in the manner shown by sections 91 and 92 above cited.

Let us consider the effect of these amendments. Section 91 of the federal Union Act states "that it shall be lawful " for Parliament to make laws in relation to all matters not " coming within the classes of subjects assigned to the legis- " latures." These subjects being those specially enumerated in section 92, and followed by a distribution of all matters of a merely local or private nature in the province, it follows that this limitation of their local or private matters was taken for the general line of demarcation between the powers; that these local or private matters, including those specially enumerated in section 92, remained within the competence of the local powers, and the rest of the powers necessary for the peace, order and good government of Canada, with those specially set forth in section 91, were attributed to Parliament and must have been considered as general powers.

But, as these latter powers, specially assigned to Parliament by section 91, were powers withdrawn from the provinces, and that before confederation they were local powers,

to remove all doubts upon the conventional nature of these powers declared to be general, section 91, at the place above cited adds:

"And for greater certainty, but not so as to restrict the "generality of the foregoing terms of this section" (that is to say to prevent those omitted powers from being considered otherwise than as powers of the Federal Parliament) "it is "hereby declared that (notwithstanding anything in this "act) the exclusive authority of the Parliament of Canada "extends to all matters coming within the classes of sub-"jects" (already enumerated).

The rule for the distribution of federal powers then is, that all which is not local and, as such, does not belong to the government of the provinces, belongs (including the powers enumerated in section 91, which are always to be considered as general powers) to Parliament.

Sections 91 and 92 might, perhaps, as well have been couched in the following terms: "The competence with respect to matters of a local or private nature, including the powers specially enumerated in section 92, which shall always be considered as local powers, shall belong to the legislatures, and the remainder of the legislative powers necessary for the peace, order and good government of Canada, including the special powers enumerated in section 91, shall be considered as general powers and shall belong to Parliament."

It was also to avoid confusion and doubt as to the ascription to Parliament of competence in these matters, that section 91 added: "And any matter coming within any of "the classes of subjects enumerated in this section shall "not be deemed to come within the class of matters of a "local or private nature, comprised in the enumeration of "the classes of subjects by this act assigned exclusively to "the legislatures of the provinces."

We cannot overlook the difficulties in interpretation occasioned by a phraseology so intricate and confused, and in order to understand it better, we might again further alter the wording of these articles, which might be summed up as follows: "With the exception of the matters enumerated in section 92 and of all which are of a local or private nature, and shall be within the competence of the provinces, Parliament shall have power to make laws necessary for the good government of Canada, upon all other matters, including those enumerated in section 91."

In taking this rule for a guide, let us see what would be the natural and logical process to practically establish the line of demarcation between the two powers.

If the 16th paragraph of section 92, ascribing to the provinces legislative power over matters of a local and private nature, had not been joined to the fifteen other paragraphs, a rule of easy application would have presented itself. The competence of the provinces would be limited to particular matters or to a particular class of laws, the remainder would belong to the Federal Parliament, and it might, in that case, have been truly said that all powers, not delegated to the legislatures, belong to Parliament. The competence of the provinces would have been special, and that of Parliament general. But it was not so, and the law has granted to the provinces power over all local matters, in addition to those specially enumerated in the paragraphs preceding paragraph 16. It follows that the concession to the provinces was general, for the aggregate of local and private laws constitutes a generality.

We have stated that each of the provinces being clothed with all the powers conferred upon the two legislatures, the powers conferred upon Parliament were taken away from the provinces. All the powers of the provinces, we also stated, were powers of a local order; that which remained

retained its nature, and that which was withdrawn, to be attributed to Parliament, was only by a fiction called general, being in reality a particular competence. As a general rule, all powers belong to the provinces and the powers of Parliament belong to it only as an exception; the powers of Parliament come from the provinces which are the source of all legislative authority in the confederation, and the legislative power of parliament is only a residue of the provincial legislative power. In this order of ideas, it should be said that all power, which is not federal, has remained provincial.

To ascertain the nature of any power whatever, it is necessary then, first, to examine all classes of local subjects, and it is only when this power does not enter in one of these classes and that it interests all the provinces, that this power becomes a federal power. If it interest only one or several provinces, without interesting all, it remains within the provincial sphere.

Again, the provincial competence constitutes the rule, the federal the exception.

This conclusion is in accordance with the spirit of legislation, and with the practical end which the authors of confederation had in view.

At the outset of confederation, no person had any idea of forming a political association; it was rather a commercial league of the nature of the Hanseatic League or the German Zollverein, than a confederation of the nature of the Germanic or Helvetian Confederation, which the provinces wished to form between themselves. This view results from historical documents and the debates upon the first proposals for intercolonial union. It was only gradually and later on, that the basis of their association was unanimously enlarged and the circle of their common interests extended to form a general government.

Whatever may have originally been the importance, more or less great, of their general relations, the idea that prevailed was to have the interests, common to all the provinces, managed by the general government, and to leave the provinces in possession of their particular governments, for the internal management of their private interests.

Starting from this idea, upon any given point, the object of any inquiry as to the competence of either power must be to ascertain whether the subject, upon which legislation is sought, affects only one or more or all of the provinces. If this subject comes directly and specifically within the sphere of one of the two powers, as marked out by sections 91 and 92, there is no doubt that it must be attributed to the power which was specifically clothed with such competence.

Thus, for example, if the subject have anything to do with the postal service or the defence of the country, it would be federal; if with the civil law or the administration of justice, it would be provincial; but if it does not fall within the special attributes of any of these powers, that is to say, within any of the 29 paragraphs of section 91 and of the 15 paragraphs of section 92 or what may be inferred from them, under the general provisions of paragraph 16, it must first be ascertained if it be local, and for this the subject matter of the two sections and the general spirit of legislation must be inquired into. If this subject affect only one or more provinces, as has been stated, it must be left to be disposed of by the legislatures; if it affect all the provinces, it is within the competence of Parliament, and in doubtful cases, as that only which is federal belongs to Parliament and the rest should belong to the provinces, which must have originally controlled and now control all which is not federal, such subject would be treated as local. In a word, in cases of doubt, the doubt is decided in favor of the provinces.

It does not always happen, however, that legislation takes such a decisive character ; there are hosts of subjects whose settlement is divided, affecting both general interests and the particular interests of the provinces, and it is upon this frequent division of powers that the federalists have based their argument in favor of the Federal Parliament. They say, in cases of doubt, only those matters that are *purely* local, and are within the terms of paragraph 16 of section 92, are of provincial competence and that the rest is federal. But this reasoning is evidently a paradox, based upon false conceptions of legislative principles ; for, in legislation, all the powers indivisible in the abstract are divisible in the concrete as the subjects upon which they are exercised. If a law, clearly federal, affect a local interest, this interest is withdrawn from the jurisdiction of Parliament, however unimportant such interest may be, as compared to the general object of the law, and *vice versa* for the provinces.

For instance, let us suppose a commercial law ; if this law affect solely the interprovincial interests of commerce, it belongs to Parliament, in the same manner as if it affected only the civil interests arising from commercial relations, it would belong to the provinces, but if it affect both the interprovincial interests and private relations, it would belong, for its interprovincial portion, to Parliament and, for its local portion, to the provinces. To ignore this distinction and say, that in the cases omitted, or in the cases provided for, only matters of a *purely* local nature are within the competence of the provinces, and that all mixed legislation belongs to Parliament, is to set up a principle contrary to the constitution, which attributes to the legislatures local matters that are altogether *local* or are not so at all, and add a strained meaning to a word of which it is not susceptible.

Paragraph 16 of section 92, in qualifying as *purely* local the matters reserved to the provinces, made use of a word

that was void of meaning and altogether inapplicable. The end of section 91 had simply called these same subjects local and private, bearing out the argument that the adverb *purely*, which precedes them in paragraph 16 of section 92, has no value. .

We have spoken of subjects that might be within the competence of both powers, on account of their double nature, general and local, in connection with the omitted cases in sections 91 and 92. In addition, there exists, for some of the subjects enumerated in those sections, a concurrent jurisdiction arising out of the text itself.

Thus, paragraph 3 of section 91 gives as within federal jurisdiction any "mode or system of taxation," and paragraph 2 of section 92 leaves to the provinces "direct taxation within "the province in order to the raising of a revenue for provin- "cial purposes."

Respecting direct taxation allowed to both powers, and in all cases in which their competence is manifest by law, there is no necessity for interpretation, and consequently no doubt, the benefit whereof should be accorded to the provinces against the federal power.

Section 95 again gives to the provinces and to the Parliament concurrent power to make laws in relation to agriculture and immigration, to the former in each province, and to the latter for all the provinces; but it is enacted, that the law of the province shall, in case of repugnance to the federal law, yield to that law and have no effect. Here again it is evident that interpretation is not required, the superiority of the federal law being declared.

Let us pass now to the powers of the provinces respecting public property.

According to the organic principles of the confederation, there is a connection between the legislative powers and the

right of property. The provinces entered into the federal compact with the entirety of their public property, as they entered into it with the entirety of their political rights and legislative powers. All public property, which was not granted to the federal government, remained with the provinces. In addition to the property, which is disposed of between the federal government and the local government by the act itself, section 117 states, " the several provinces " shall retain all their respective public property, not other- " wise disposed of in this act," a provision that shows, that the provinces, in entering the Union, had not abandoned their rights of property, any more than they had abandoned their legislative powers, but that they had retained all that they had not resigned to the federal government.

They also each have their separate budget, and section 126 enacts that the duties and revenues over which the respective legislatures of Canada " had, before the Union, power of ap- " propriation, as are by this act reserved to the respective " governments or legislatures of the provinces, and all duties " and revenues raised by them in accordance with the special " powers conferred upom them by this act, shall in each pro- " vince form one consolidated revenue fund to be appropriat- " ed for the public service of the province," and section 109, in addition to these provisions, adds " all lands, mines, minerals " and royalties, belonging to the several provinces of Canada, " Nova Scotia and New Brunswick at the Union, and all sums " then due or payable for such lands, mines, minerals, or roy- " alties shall belong to the several provinces of Ontario, Que- " bec, Nova Scotia and New Brunswick, in which the same " are situate or arise."

It is objected, as was done by a judge in the question of an escheat between the Federal Attorney General and the Attorney General of Quebec, * that the provinces have not,

* The case before the Superior Court at Kamouraska, respecting the vacant estate of Edward Fraser.

as the federal power, a civil list, but this is an error. Out of the consolidated fund, established by section 126, a certain sum is set apart to defray the civil expenditure of the province. It is true that the civil list is granted to the Sovereign in England for her personal expenses and that ours does not contain a similar grant, inasmuch as the province does not defray the salary of the representative of royalty; but, if we do not grant supplies to the Sovereign, we pay the officers of the civil government, and it is from this application of the public funds that the civil list gets its name. Some French writers even think the English practice anomalous, which calls a civil list the grant to a Sovereign who does not pay the civil expenses of his government, expenses that are paid by the State.

As with the finances so with respect to legislation and government, the provinces then are, with the exception of the cases provided for, and which we have enumerated above, independent of the federal government, and, in the sphere of their property, rights and powers, they are on an equality with it. If it were not that the imperial sovereignty overrides all our public organization we would say that they are sovereign in their sphere, as it is in its sphere.

With respect to the connection between legislative power and the right of public property, it might be added, that the power and the duty being correlative, the federal parliament should defray all the expenditure incurred for the subjects within its jurisdiction, and, in the same manner as the provinces defray the expenditure for civil justice which is of their competence, the federal government should defray those incurred for the administration of criminal justice, which is within its competence. This subject however not being within the scope of this discussion, the sole object of this remark is to call public attention to the matter, which, if inopportune, is far from being without interest.

Before making a summary of the propositions which in my opinion would determine the respective competence of the Federal Parliament and the legislatures, I must state, that it is solely from a legislative point of view that I have considered the matter ; that I have treated it rather in its legal and constitutional aspects and as a question of judicial competence, than in its political aspects.

I voluntarily admit that from this latter point of view, the federal government, moving in a larger sphere, having more imposing powers at its disposal, a larger and more extended representation, and at its head the Governor General who exercises directly the authority of the Sovereign, not over one province only, but over the whole of British North America, with a real though limited control over the Lieutenant Governors, who are representatives of royalty, in a more modest and restricted sphere, I admit, I say, its pre-eminence over the provinces, which it controls in certain respects, in their external and formal relations, more perhaps than in real grandeur; but that is not the question, which is one respecting the interpretation and application of constitutional laws, which determine the powers of the provinces as well as those of the federal government, and which regulate their juridical relations.

VIII.

SUMMARY OF THE PROPOSITIONS SET FORTH IN THIS LETTER.

A summary of these propositions may be stated as follows :—

1. The confederation of the British Provinces was the result of a compact entered into by the provinces and the Imperial Parliament, which, in enacting the British North America Act, simply ratified it.

2. The provinces entered into the federal Union, with their corporate identity, former constitutions, and all their legislative powers, part of which they ceded to the Federal Parliament, to exercise them in their common interest and for purposes of general utility, keeping the rest which they left to be exercised by their legislatures, acting in their provincial sphere, according to their former constitutions, under certain modifications of form, established by the federal compact.

3. Far from having been conferred upon them by the federal government, the powers of the provinces not ceded to that government are the residue of their old powers, and far from having been created by it, the federal government was the result of their association and of their compact, and was created by them.

4. The Parliament has no legislative powers beyond those which were conferred upon it by the provinces, and which are recognized by section 91 of the British North America Act, which conferred upon it, only the powers therein mentioned or those of a similar nature, *ejusdem generis*.

5. In addition to the powers conferred upon the legislatures by section 91 and section 92, their legislative jurisdiction extends to all matters of a local or private nature, and all omitted cases fall within provincial jurisdiction, if they toueh the local or private interests of one or some of the provinces only; on the other hand, if they interest all the provinces, they belong to Parliament.

6. In case it be doubtful whether any special matter touches all, or one, or a few provinces only, that is to say, if it be of general or local interest, such doubt must be decided in favor of the provinces, which preserved all their powers not ascribed to Parliament.

7. In the reciprocal sphere of their authority thus recognized, there exists no superiority in favor of Parliament over the provinces, but, subject to Imperial sovereignty, these provinces are quasi-sovereign within their respective spheres, and there is absolute equality between them.

8. The British North America Act, was not, as the constitutional acts which preceded it, a law made by the Sovereign authority of England imposing a constitution upon its colonies.

a. It contained a simple ratification by the Mother Country of the agreement entered into by the provinces, which in confirming its provisions rendered them obligatory by giving them the authority of an Imperial act.

b. Without attacking British sovereignty and without, in any way, hindering its exercise with respect to the Dominion, the appreciation of the relations between the federal government and the provinces, created by this agreement, thus made an Imperial statute, the distribution of the respective duties of the two bodies, and the interpretation of the statute, must be made as if the provinces had originally the right of their own private authority to enter into this agreement, and as if they had been sovereign powers.

c. The Imperial Government, which alone had the right to contest this fiction, renounced the same by retroactively legalizing their acts by its ratification.

This eighth and last proposition, which is the justification of those which precede it, and the foundation stone of my work, I will prove in a future letter, as well from the act itself, its comparison with the resolutions of the conference, and the discussion before the Colonial and Imperial Parliaments, as from a narration of the events respecting Confederation which took place both in Canada and in England.

T. J. J. LORANGER.